Supreme Court, U.S.
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No. 99-1235

IN THE
Supreme Court of the United States

GREEN TREE FINANCIAL CORP.—ALABAMA, AND GREEN TREE FINANCIAL CORPORATION,
Petitioners,

v.

LARKETTA RANDOLPH
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in concluding that an order compelling arbitration and dismissing a lawsuit's underlying claims is a "final decision with respect to an arbitration" appealable under 9 U.S.C. § 16(a)(3).

2. Whether the court of appeals erred in concluding that an arbitration provision that was "silent" on the issue of costs and fees was unenforceable under the Federal Arbitration Act because the risk that plaintiff "might" be required to bear unknown costs and fees potentially undermined her ability to vindicate statutory rights.

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state that Green Tree Financial Corp. is now known as Conseco Finance Corp. Petitioners remain wholly owned subsidiaries of Conseco, Inc., an Indiana corporation whose stock is publicly traded. Petitioners further state that no publicly owned company owns ten percent or more of the stock of Conseco, Inc.

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BRIEF OF PETITIONERS

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-19a) is published at 178 F.3d 1149 (11th Cir. 1999). The court of appeals' order denying the petition for rehearing (Pet. App. 55a-56a) is unpublished. The district court's memorandum opinion and order (Pet. App. 20a-50a) is published at 991 F. Supp. 1410 (M.D. Ala. 1997). The district court's order denying respondent's motion for reconsideration (Pet. App. 51a-54a) is published at 991 F. Supp. 1410, 1425-26 (M.D. Ala. 1997).

JURISDICTION

The court of appeals entered judgment on June 22, 1999, and denied a petition for rehearing on October 28, 1999. The petition for a writ of certiorari was filed on January 21, 2000, and was granted on April 3, 2000. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The statutes relevant to this case are the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, and the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §§ 1691-1691f. The relevant provisions of these statutes are reproduced in the statutory addendum attached to this brief.

STATEMENT OF THE CASE

The question of appellate jurisdiction presented is whether an order compelling arbitration and dismissing a lawsuit's underlying claims is a "final decision with respect to an arbitration" and is therefore immediately appealable under 9 U.S.C. § 16(a)(3). As demonstrated below, the answer is no. The underlying purpose of the FAA, the structure of Section 16, and the existing legal framework against which Section 16(a)(3) was enacted each confirms that an order compelling arbitration in an "embedded" proceeding is not a "final decision" that is appealable under Section 16(a)(3). The court of appeals' contrary conclusion was based on snippets from the legislative history that cannot substitute for or overcome the contrary congressional intent reflected in the text, structure and purpose of Section 16 and the FAA. Nor can the district court's decision to label the order compelling the parties to arbitrate a "dismissal" "with prejudice" rather than a "stay" – a label that has no bearing on the substance of the district court's action – make an otherwise interlocutory order a "final decision" under Section 16(a)(3).

Further, assuming this matter is appealable, this case presents the question of whether the court of appeals erred in concluding that the arbitration agreement was unenforceable because its "silence" on the issue of costs and fees created the risk that respondent "might" be required to bear unknown costs and fees associated with arbitration that could undermine her ability to vindicate her statutory rights under TILA and ECOA. As demonstrated below, the court of appeals clearly erred because the arbitration agreement was not "silent" on the issue of costs and fees. It provided the arbitrator with "all powers provided by the law," and the "law" relevant to respondent's statutory claims under TILA and ECOA is clear that "the costs of the action" are a component of damages to which respondent would be entitled if she prevailed in arbitration. Indeed, even if the agreement were ambiguous, that ambiguity must be resolved in favor of arbitration. The court of appeals' contrary conclusion was based on an outdated and improper mistrust of the arbitral process that this Court repeatedly has rejected.

Moreover, respondent also argues that the arbitration agreement is unenforceable as to her TILA claim because it does not provide class action procedures. Even if respondent's challenge were properly presented, this Court previously has addressed and rejected the same argument. Further, Congress has not expressed an intent to preclude waiver of judicial remedies under TILA. Indeed, TILA authorizes parties to waive federal procedures through its grant of concurrent jurisdiction in state court. Finally, TILA provides a host of incentives to ensure that plaintiffs, such as respondent, can bring such actions individually, and they routinely do bring such lawsuits.

Statutory Background

1. *The Federal Arbitration Act.* In 1925, Congress enacted the FAA to reverse centuries of judicial hostility to arbitration agreements and to allow parties to avoid "the costliness and delays of litigation" through arbitration. H.R. Rep. No. 68-96, at

1-2 (1924); see also Y2K Act, 15 U.S.C. § 6601(b)(3) (arbitration provides alternative to "costly and time-consuming litigation"). Prior to enactment of the FAA, "[t]he federal courts – like those of the States and of England – ha[d] . . . denied, in large measure, the aid of their processes to those seeking to enforce executory agreements to arbitrate disputes" and had refused "to compel specific performance, or to stay proceedings on the original cause of action." *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 120-21 (1924) (citations omitted). By enacting the FAA, Congress endeavored to reverse that judicial hostility through a procedure for the enforcement of arbitration agreements that was "very simple" and that would "reduc[e] technicality, delay, and expense to a minimum and at the same time safeguard[] the rights of the parties." H.R. Rep. No. 68-96, at 2. As this Court recently explained, "Congress, when enacting [the FAA], had the needs of consumers, as well as others, in mind." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995); see also S. Rep. No. 68-536, at 3 (1924) (the FAA, by avoiding "the delay and expense of litigation" will appeal "to big business and little businesses, . . . corporate interests [and] . . . individuals").

Specifically, Section 2 of the FAA provides that a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In turn, sections 3 and 4 of the FAA provide a mechanism for enforcing that command by authorizing a court to "stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement," *id.* § 3, or to enter an "order directing that [the] arbitration proceed in the manner provided for in such agreement," *id.* § 4.

Once arbitration has been ordered, the FAA contemplates further court involvement in connection with the ultimate arbitration award. Under Section 9, a party may file an application "for an order confirming the award" which the court "must grant

. . . unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of [the FAA]," *id.* § 9. In turn, Section 10 authorizes a court to "vacat[e]" an arbitral award if (i) "the award was procured by corruption, fraud, or undue means," (ii) "there was evident partiality or corruption in the arbitrators," (iii) "the arbitrators were guilty of misconduct" or (iv) "the arbitrators exceeded their powers." *Id.* § 10(a)(1)-(4); see also *First Options, Inc.* v. *Kaplan*, 514 U.S. 938, 942 (1995) (court may vacate award for "'manifest disregard'" of law). Similarly, under Section 11, a court "may make an order modifying or correcting the award." 9 U.S.C. § 11(a)-(c) (setting forth reasons for modifying arbitral award). This Court has ruled that this post-award review "'is sufficient to ensure that arbitrators comply with the requirements of the statute' at issue." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 n.4 (1991) (quoting *Shearson/Am. Express Inc.* v. *McMahon*, 482 U.S. 220, 232 (1987)).

With respect to appellate review of arbitration orders, in 1988, Congress enacted section 16, which governs appeals of district court orders and reflects the same pro-arbitration policy evident in the substantive provisions of the FAA. Under Section 16, orders hostile to arbitration, whether interlocutory or final, are appealable immediately as of right. 9 U.S.C. § 16(a)(1), (2). Thus, a party may appeal immediately an order (i) "refusing to stay an action under section 3," (ii) "denying a petition under section 4 . . . to order arbitration to proceed," or (iii) "granting, continuing, or modifying an injunction against an arbitration." *Id.* In contrast, a party generally cannot appeal immediately an interlocutory order that favors arbitration, including an order (i) "granting a stay of any action under section 3," (ii) "directing arbitration to proceed under section 4" or (iii) "refusing to enjoin an arbitration." *Id.* § 16(b). Rather, immediate appeal of such an order is available only in extraordinary circumstances where the district court certifies the order for appeal *and* the court of appeals permits the appeal to be taken. *Id.*;

see 28 U.S.C. § 1292(b). Finally, under section 16(a)(3), an appeal may be taken from "a final decision with respect to an arbitration that is subject to this title." 9 U.S.C. § 16(a)(3). Section 16 does not define the phrase "a final decision with respect to an arbitration."

2. *The Truth in Lending Act.* The Truth in Lending Act ("TILA") was enacted "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit . . . ." 15 U.S.C. § 1601(a). TILA requires disclosure of the "finance charge" imposed "by the creditor as an incident to the extension of credit." *Id.* § 1605(a); see also 12 C.F.R. 226.18 (setting forth "[c]ontent of disclosures" under TILA). As relevant here, TILA provides that "[c]harges or premiums for insurance, written in connection with any consumer credit transaction, against loss of or damage to property or against liability arising out of the ownership or use of property, shall be included in the finance charge." 15 U.S.C. § 1605(c). Such premiums, however, may be excluded from the finance charge if "a clear and specific statement in writing is furnished by the creditor to the person to whom the credit is extended, setting forth the cost of the insurance if obtained from or through the creditor, and stating that the person to whom the credit is extended may choose the person through which the insurance is to be obtained." *Id.*; see also 12 C.F.R. § 226.4(d)(2) & n.5 (setting forth requirements under which "[p]remiums" for "single interest insurance" "may be excluded from the finance charge"). The regulations in effect when respondent first filed suit provided that the "finance charge," in transactions such as respondent's, would "be considered accu-

rate if it [was] . . . not more than $10 above or below the exact finance charge." 12 C.F.R. § 226.18 n.41 (1996).[1]

Congress provided several avenues to vindicate the rights embodied in TILA. First, TILA provides for administrative enforcement by a host of interested federal agencies. 15 U.S.C. § 1607(a), (c). Among other things, these federal agencies may "require the creditor to make an adjustment to the account of the person to whom credit was extended, to assure that such person will not be required to pay a finance charge in excess of the finance charge actually disclosed." *Id.* § 1607(e)(1). Moreover, these agencies "shall require such an adjustment" when the error resulted from "(A) a clear and consistent pattern or practice of violations, (B) gross negligence, or (C) a willful violation." *Id.* § 1607(e)(2). Further, violators who "willfully and knowingly" fail to provide disclosures required by TILA or its regulations face criminal penalties, including a fine of $5,000, imprisonment of "not more than one year, or both." *Id.* § 1611.

In addition to these administrative and criminal remedies, TILA authorizes individuals to bring civil actions when aggrieved by a "creditor who fails to comply with any requirement imposed under this part." *Id.* § 1640(a). Individuals are offered the choice of bringing such actions "in any United States district court, or any other court of competent jurisdiction." *Id.* § 1640(e). In such a suit, a creditor who "fails to comply with any requirement imposed [by TILA] . . . with respect to any person is liable to such person [for] . . . any actual damage sustained by such person as a result of the failure." *Id.* § 1640(a)(1). In addition to actual damages, a plaintiff, such as respondent, if she prevailed, would be entitled to statutory damages of "not less than $200 or greater than $2,000," *id.*

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[1] The current TILA regulations provide that "the disclosed finance charge . . . shall be treated as accurate if [it] . . . (i) is understated by no more than $100." 12 C.F.R. § 226.18(d)(1).

§ 1640(a)(2)(A)(iii), and "the costs of the action, together with a reasonable attorney's fee," *id.* § 1640(a)(3).

TILA also imposes restrictions on the relief available to individuals who choose to represent a class of plaintiffs under Federal Rule of Civil Procedure 23. *Id.* § 1640(a). Unlike individual actions, members of a class are not guaranteed a "minimum recovery" of statutory damages, and, "in any class action or series of class actions arising out of the same failure," the maximum recovery is capped at "the lesser of $500,000 or 1 per centum of the net worth of the creditor." *Id.* § 1640(a)(2)(B). TILA provides a series of statutory factors that must be assessed in determining the proper "award in any class action." *Id.* § 1640(a). With respect to certain TILA violations, in 1995, Congress enacted a moratorium during which time "no court [could] enter any order certifying any class in any action under [TILA]." *Id.* § 1640(i).

3. *Equal Credit Opportunity Act.* The Equal Credit Opportunity Act ("ECOA") makes it unlawful for any "creditor to discriminate against any applicant . . . because the applicant has in good faith exercised any right under [the Consumer Credit Protection Act]." 15 U.S.C. § 1691. As in TILA, the statutory requirements of ECOA are enforced by responsible federal agencies. *Id.* § 1691c(a), (c). If the federal agencies are unable to secure compliance, they "are authorized to refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted." *Id.* § 1691e(g). The Attorney General, in turn, may bring a civil action "for such relief as may be appropriate, including actual and punitive damages and injunctive relief." *Id.* § 1691e(h).

As in TILA, under ECOA, an individual may recover civil damages by filing suit in "United States district court . . . or in any other court of competent jurisdiction." *Id.* § 1691e(f). Under ECOA, an aggrieved party is entitled to recover "any actual damages sustained," *id.* § 1691e(a); "punitive

damages in an amount not greater than $10,000," *id.* § 1691e(b); and "the costs of the action, together with a reasonable attorney's fee," *id.* § 1691e(d). If an individual chooses instead to bring a class action, regardless of the size of the class, punitive damages are capped at "the lesser of $500,000 or 1 per centum of the net worth of the creditor." *Id.* § 1691e(b).

Factual Background

On January 25, 1994, respondent Larketta Randolph ("respondent") purchased a "manufactured" or mobile home from Better Cents Home Builders Inc. ("Better Cents"). Pet. App. 2a. Respondent financed the $38,958.00 purchase price through Petitioner Green Tree Financial Corp. — Alabama, a wholly owned subsidiary of Green Tree Financial Corporation (collectively, "petitioners"). Joint Lodging ("J.L.") 35. Respondent's retail installment contract ("Contract") with Better Cents identifies petitioner Green Tree Financial Corp. as the assignee and contains the arbitration provision that is at the center of this dispute. Pet. App. at 2a-3a. The Contract is reproduced in the Joint Lodging. J.L. 35, 37.

On the front of the Contract, directly below the names of the parties, is a box entitled "Federal Truth-in-Lending Act Disclosures," which includes the annual percentage rate for the credit, the finance charge, the amount financed, the total of the payments over the life of the loan and the total sales price. J.L. 35. Directly below that box, is a box entitled "Physical Damage Insurance," which informed respondent that "Physical Damage Insurance is required but [respondent] may obtain it from anyone [respondent] want[s] that is acceptable to [the seller]. If [respondent] get[s] the insurance checked below from [the seller] or through [the seller], [respondent] will pay [the seller] $545.00 for a term of 01 years." *Id.* The Contract reflects that the $545.00 premium would purchase "Comprehensive,"

"Flood," "Liability," and "Vendor's Single Interest" insurance. *Id.*

> Directly above the signature line, the Contract provides:
>
> CAUTION – IT IS IMPORTANT THAT YOU THOROUGHLY READ THE CONTRACT BEFORE YOU SIGN IT.

J.L. 35 (bold omitted). Above this statement, the Contract provides in prominent typeface:

> NOTICE: SEE OTHER SIDE FOR ADDITIONAL TERMS AND CONDITIONS OF THIS CONTRACT.

Id. (bold omitted). Respondent signed directly below these provisions. Joint Appendix ("J.A.") 35.

The arbitration agreement appears on the other side of the Contract. J.L. 37. First, it provides that "[a]ll disputes, claims, or controversies arising from or relating to this Contract or the relationships that result from this Contract, or the validity of this arbitration clause or the entire Contract, shall be resolved by binding arbitration by one arbitrator selected by Assignee with consent of Buyer(s)." Pet. App. 57a. Further, it explains that, by entering into the Contract, the parties acknowledged that "[t]his arbitration Contract is made pursuant to a transaction in interstate commerce" that is "governed by the Federal Arbitration Act," *id.*, and that "[t]he parties agree and understand that they choose arbitration instead of litigation to resolve disputes." *Id.* Finally, the arbitration agreement states:

> The parties agree and understand that all disputes arising under case law, *statutory law*, and all other laws including, but not limited to, all contract, tort, and property disputes, will be subject to binding arbitration in accord with this Contract. The parties agree and understand that *the arbitrator shall have all powers provided by the law* and the Contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief.

Id. (emphasis added). The text of the arbitration agreement is reproduced at Pet. App. 57a-58a.

In January 1996, respondent filed suit in the United States District Court for the Middle District of Alabama, alleging that petitioners violated TILA by failing to disclose as a finance charge the portion of the insurance premium paid by respondent attributable to Vendor's Single Interest ("VSI") insurance. J.A. 26 (Second Amended Compl. ¶ 24). Specifically, respondent contends that the portion of the $15.00 VSI premium attributable to insuring "Green Tree's possible repossession expenses," *id.*, should have been disclosed as a finance charge rather than as an insurance premium, Opp. 2; see also J.L. 35. Thus, respondent contends that the Contract violated TILA because the $55,278.00 finance charge disclosed by petitioners in the Contract, in her view, also should have reflected a $15.00 VSI insurance premium. Opp. 2.[2] In addition to actual damages, respondent seeks "statutory damages," "costs of suit" and "attorney's fees and litigation expenses pursuant to 15 U.S.C. § 1640." J.A. 26 (Second Amended Compl. ¶ 24).

Respondent also alleges that petitioners violated ECOA because the Contract includes an "arbitration clause which seeks to compel the resolution of all statutory causes of action in arbitration." J.A. 26 (Second Amended Compl. ¶ 27).

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[2] Even accepting respondent's theory of liability, her own submissions demonstrate that her $15.00 estimate is overstated. According to respondent, the portion of the insurance premium she paid that was attributable to VSI insurance was $15.00. Opp. 2; J.L. 3. The exhibits to her Complaint make clear that this $15.00 VSI premium purchased coverage that protected the lienholder against "[c]ollision (including Upset) of the mobile home" and "[c]onversion, embezzlement and secretion of the mobile home by [respondent]," *id.* at 27. The governing regulations provide that any portion of that $15.00 VSI premium allocable to insurance for "normal property damage, concealment, confiscation, conversion, embezzlement, and skip" need not be included in the finance charge. *See* 12 C.F.R. § 226.4(d)(2) & n.5; *Regulation Z Commentary*, 3 Fed. Reserve Reg. Serv. 6-1165.2(10) (Nov. 1998).

According to respondent, by including this arbitration agreement in the Contract, Green Tree "violate[d] 15 U.S.C. § 1691(a)(3) which prohibits a creditor from requiring a waiver of rights." J.A. 26-27 (Second Amended Compl. ¶ 28). In connection with this claim, respondent seeks "punitive damages," "actual damages," "attorney's fees and litigation expenses" and "costs of suit." *Id.*

Finally, respondent requested certification of a class action of all individuals who had entered into similar agreements with petitioners. She also sought monetary damages, including attorneys' fees and recovery of litigation expenses. Pet. App. 22a, 27a.

Petitioners filed a Motion to Stay Action and Compel Arbitration. J.A. 29-30. In resolving that Motion, the district court did not address the merits of respondent's claims, but instead, focused on whether respondent could be compelled to arbitrate her claims. Pet. App. 26a n.5. After concluding that the FAA applied because the Contract satisfied the necessary interstate commerce nexus, *id.* at 23a n.4 (citing *Allied-Bruce*, 513 U.S. 265), the court explained that by enacting the FAA, Congress "manifested a 'liberal federal policy favoring arbitration agreements,'" *id.* at 24a (quoting *Gilmer*, 500 U.S. at 24-25). As a result, "'questions of arbitrability must be addressed with a healthy regard for the federal policy *favoring* arbitration.'" *Id.* (emphasis added) (quoting *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). To resolve whether respondent should be compelled to arbitrate her statutory claims, the court applied a two-part test asking "[1] whether the Parties' agreement to arbitrate reaches the statutory issues, and . . . [2] whether legal constraints external to the Parties' agreement foreclosed the arbitration of those claims." Pet. App. 27a.

First, the court explained that the arbitration agreement, by its terms, applied to claims arising under "'statutory law,'" and

therefore was "sufficiently broad to encompass [respondent's] TILA, ECOA, and other claims." *Id.* at 28a. *Second*, the court explained that by agreeing to arbitrate statutory claims "'a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" Pet App. 29a (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). As a result, *respondent* bore the burden of showing that Congress intended to preclude a waiver of judicial remedies. Because respondent did "not cite any provision of the text or legislative history of either the TILA or the ECOA that expressly preclude[d] waiver of judicial remedies," the court focused on whether there was evidence of a "conflict between arbitration and the statutes' underlying purpose." Pet. App. 30a. The court ruled that "'the fact that [TILA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.'" *Id.* at 33a (quoting *Gilmer*, 500 U.S. at 32). Similarly, the court rejected as "unpersuasive" respondent's argument that 15 U.S.C. § 1691(a)(3), which bars a creditor from extending credit conditioned on the release of potential claims for TILA violations that arose in the past, rendered the arbitration provision unenforceable. *Id.* at 34a-35a.

Accordingly, the court granted petitioners' motion to compel respondent to submit her claims "to binding arbitration pursuant to the arbitration provision in her contract." Pet. App. 49a. Acknowledging that it was authorized to stay the proceedings, see 9 U.S.C. § 3, the court instead dismissed the case "with prejudice" because all of respondent's claims were to be submitted to arbitration. Pet. App. 48a. On reconsideration, the court adhered to its prior ruling, explaining that it would "gladly modify and/or vacate its [prior] Order," if warranted by a change in circumstances. *Id.* at 54a.

Decision Of The Court Of Appeals

The Eleventh Circuit reversed. Pet. App. 2a. *First*, the court of appeals addressed whether the district court's order was a "'final decision with respect to an arbitration that is subject to [the FAA].'" *Id.* at 6a (quoting 9 U.S.C. § 16(a)(3)). On that issue, the court of appeals acknowledged that the majority of circuits had drawn a distinction between "'embedded'" proceedings in "which the arbitration issue arises as part of a broader action dealing with other issues," and "'independent'" proceedings, in which "the motion to compel arbitration is the only issue before the court." *Id.* at 7a, 8a (emphasis in original omitted).[3] The Eleventh Circuit recognized that these "circuits have held that orders compelling arbitration which arise in embedded proceedings must be treated as interlocutory and non-appealable, not as 'final decisions' under § 16(a)(3)." *Id.* at 7a. Moreover, it explained that at least five courts of appeals that had adopted the embedded/independent framework for analyzing finality under Section 16(a)(3) had held that "a district court's order compelling arbitration in an embedded proceeding is interlocutory and non-appealable, even if the district court dismisses the remaining claims." *Id.* at 8a-9a (emphasis in original omitted).

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[3] The court of appeals identified *eight* circuits in which orders compelling arbitration in "embedded" proceedings would be considered non-final for purposes of Section 16(a)(3). Pet. App. 7a-8a (citing *John Hancock Mut. Life Ins. Co.* v. *Olick*, 151 F.3d 132, 135-36 (3d Cir. 1998); *Seacoast Motors, Inc.* v. *Chrysler Corp.*, 143 F.3d 626, 628 (1st Cir.), *cert. denied*, 525 U.S. 965 (1998); *Napleton* v. *General Motors Corp.*, 138 F.3d 1209, 1212 (7th Cir.), *cert. denied*, 525 U.S. 931 (1998); *McCarthy* v. *Providential Corp.*, 122 F.3d 1242, 1244 (9th Cir. 1997), *cert denied*, 525 U.S. 921 (1998); *In re Pisgah Contractors, Inc.*, 117 F.3d 133, 136 (4th Cir. 1997); *Altman Nursing, Inc.* v. *Clay Capital Corp.*, 84 F.3d 769, 771 (5th Cir. 1996); *Gammaro* v. *Thorp Consumer Discount Co.*, 15 F.3d 93, 95 (8th Cir. 1994); *Filanto, S.p.A.* v. *Chilewich Int'l Corp.*, 984 F.2d 58, 60-61 (2d Cir. 1993)).

The Eleventh Circuit "decline[d]" to adopt the majority rule, stating that the intent of Section 16 was to "clear away the deadwood" and to "furnish a clear rule for appealability of orders relating to arbitration proceedings." Pet. App. 11a, 12a. (internal quotation marks omitted). Ignoring that the "embedded/independent" framework provided just such a clear rule, the court of appeals looked instead to statements in the legislative history of Section 16 to conclude that an "'[a]ppeal can be taken from . . . a final judgment dismissing an action in deference to arbitration.'" *Id.* at 13a (omission in original) (quoting *Arnold* v. *Arnold Corp.*, 920 F.2d 1269, 1274-75 (6th Cir. 1990)). Ultimately, the court of appeals held that the district court's "order compelling arbitration was an appealable 'final decision' under 9 U.S.C. § 16(a)(3)," *id.* at 15a.

Second, the Eleventh Circuit considered whether the arbitration provision was unenforceable. The court paid lip service to the "strong federal policy favoring arbitration" and recognized that the "procedural apparatus of an arbitration should not make an arbitration clause unenforceable." Pet. App. 15a (internal quotation marks omitted). Nonetheless, the court of appeals ignored these principles in ruling that the arbitration provision was unenforceable because it "fail[ed] to provide the minimum guarantees required to ensure that [respondent's] ability to vindicate her statutory rights will not be undone by steep filing fees, steep arbitrators' fees, or other high costs of arbitration." *Id.* at 18a.

In doing so, the court of appeals did not identify any provision of TILA that would be frustrated by arbitration of respondent's claims. Nor did the court of appeals identify any record evidence that arbitration of respondent's statutory claims would result in the imposition of substantial arbitration costs that respondent would be required to bear. Indeed, the Eleventh Circuit ignored that the arbitration agreement provided that the arbitrator was authorized to award such costs to the prevailing party based on a provision in the arbitration agreement granting

the arbitrator "all powers provided by the law." Pet. App. 57a. Instead, it relied upon the *absence* of any record evidence on these issues to rule that the arbitration provision "raises serious concerns with respect to filing fees, arbitrators' costs and other arbitration expenses that may curtail or bar a plaintiff's access to the arbitral forum." *Id.* at 17a.

In the end, the court of appeals acknowledged that the arbitration agreement did not, by its terms, impose the costs of the proceeding on respondent and that there was *no* record evidence regarding the amount or the apportionment of those costs. Pet. App. 17a, 18a. Nevertheless, it resolved that failure of proof *against* arbitration by speculating that respondent "*might* be required to bear substantial costs of the arbitration even if she were to prevail." *Id.* at 19a (emphasis added). On this basis alone, the court of appeals declared the arbitration agreement unenforceable.

SUMMARY OF ARGUMENT

The common thread between the two holdings of the court of appeals is the manifest hostility of the panel to arbitration. In stark contrast to both the language and plain intent of Congress embodied in the FAA and a consistent line of decisions by this Court interpreting that statute, the court of appeals' basic approach is far out of step with the applicable statutory and judicial norms strongly favoring methods of alternative dispute resolution, primarily including arbitration. Had the court of appeals faithfully attempted to promote arbitration over litigation, it is clear that the court of appeals would have concluded that it lacked jurisdiction to review the district court's order requiring the parties' dispute to be arbitrated immediately and would have resolved its "concerns" about the costs of arbitration in favor of enforcement of the parties' contract. Because the court of appeals instead allowed distrust of arbitration to animate its decision, it erred in both of its rulings. Accordingly, its judgment

should be reversed and the matter allowed to proceed in accordance with the parties' agreement to resolve this dispute through arbitration.

1. The purpose of the FAA, the structure of Section 16, and the legal framework against which the text of Section 16(a)(3) was enacted each confirms that the district court's order compelling respondent to arbitrate the merits of her claims against petitioners is not a "final decision" under Section 16(a)(3). In enacting Section 16, Congress sought to promote the FAA's strong policy in favor of arbitration by limiting the ability of parties to avoid or delay compliance with their obligations under arbitration agreements by providing for immediate appeal of orders that disfavor arbitration and generally prohibiting immediate appeal of interlocutory orders that favor arbitration. Although Congress specifically modified aspects of the appellate process that had disfavored arbitration, in Section 16(a)(3), Congress codified the existing legal framework which distinguished between "embedded" and "independent" proceedings for purposes of determining whether an order denying or compelling arbitration constituted a "final decision." Under that framework, the district court's order compelling arbitration and dismissing the lawsuit, which occurred in an embedded proceeding, is not a final decision and therefore is not appealable under Section 16(a)(3).

The district court's decision to label its order compelling arbitration a "dismissal" "with prejudice" rather than a "stay," has no bearing on the substantive effect of the ruling and should have no bearing on whether that order is appealable under Section 16(a)(3). Regardless of the label, respondent will be entitled to present the merits of her claims in arbitration, and, if she is dissatisfied with the outcome, she would be entitled to challenge the arbitral award in the same district court that compelled her to arbitrate. Indeed, this Court has held that distinctions that have no bearing on the substance of an order should have no effect on whether it is appealable. Moreover, allowing a district

court's choice of label to control whether an otherwise interlocutory order may be appealed immediately would undermine Section 16(b), which requires that such orders can be appealed only with prior authorization by both the district court *and* the court of appeals.

2. Through the FAA, Congress has expressed an emphatic federal policy in favor of enforcing agreements by private parties to arbitrate their disputes. Accordingly, a party seeking to avoid an agreed-upon obligation to arbitrate a dispute bears the heavy burden of proving (1) that the arbitration agreement, by its terms, does not apply to the dispute, or (2) that arbitration of the underlying federal statutory right is contrary to the intent of Congress.

In this case, the court of appeals, reflecting an outdated and discredited distrust of arbitration, surmised that the arbitration agreement's putative "silence" on the issue of costs and fees created a "risk" that the underlying federal statutory rights would be compromised in arbitration. That conclusion is flatly mistaken on two counts. First, the arbitration agreement was not silent on this issue. It made clear that the arbitrator "shall have all powers provided by the law" and therefore was authorized under TILA and ECOA to award respondent, if she prevailed, "the costs of the action, together with a reasonable attorney's fee." 15 U.S.C. § 1640(a)(3) (TILA); *accord id.* § 1691e(d) (ECOA). Second, respondent presented no evidence to meet her burden of establishing that she would be unable in arbitration to vindicate effectively her federal statutory rights.

Finally, the Court need not address respondent's alternative claim that arbitration creates an "inherent conflict" with TILA because an individual can "effectively vindicate" her statutory rights only in class action litigation rather than individual arbitration. In any event, that argument is meritless. This Court previously has rejected precisely the same argument in the context of a challenge to arbitration under the ADEA. See *Gilmer,*

500 U.S. at 32. Moreover, as explained in *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989), Congress's grant of concurrent jurisdiction in state courts under TILA constitutes "explicit authorization" for individuals to waive federal procedural rights such as federal class action procedures. See *id.* at 482. Indeed, the incentive structure reflected in TILA is designed to ensure that individuals can and will bring individual actions even if their actual damages may be relatively modest. Finally, Congress's decision to limit the damages that otherwise would be available in class actions under TILA reflects that Congress did not view class action litigation as the only procedural mechanism through which substantive rights under TILA could be vindicated.

ARGUMENT

I. AN ORDER COMPELLING ARBITRATION AND DISMISSING AN "EMBEDDED" PROCEEDING IS NOT A "FINAL DECISION" UNDER 9 U.S.C. SECTION 16(a)(3).

Settled principles of statutory construction confirm that the district court's order compelling the parties to arbitrate their dispute and dismissing the case is not a "final decision" within the meaning of Section 16(a)(3) of the FAA. That conclusion is confirmed by the underlying purpose of the FAA, the structure of Section 16, and the existing legal framework against which Section 16(a)(3) was enacted.

A. Settled Statutory Construction Principles Govern The Scope Of Appellate Jurisdiction Under Section 16(a)(3) And They Preclude An Appeal In This Case.

"It is axiomatic that '[t]he starting point in every case involving construction of a statute is the language itself.'" *Landreth Timber Co.* v. *Landreth*, 471 U.S. 681, 685 (1985) (quoting

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)). "'[T]he meaning of statutory language, plain or not, depends on context.'" *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994) (quoting *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)). As a result, the Court "consider[s] not only the bare meaning of the word[s] but also [their] placement and purpose in the statutory scheme," *Bailey* v. *United States*, 516 U.S. 137, 145 (1995), as well as "the provisions of the whole law" including "its object and policy," *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 35 (1990) (internal quotation marks omitted). Thus, "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (citation omitted). Indeed, it is a "cardinal principle" of statutory construction "'to give effect, if possible, to every clause and word of a statute . . . rather than to emasculate an entire section.'" *Bennett* v. *Spear*, 520 U.S. 154, 173 (1997).

Moreover, "'if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.'" *Evans* v. *United States*, 504 U.S. 255, 260 n.3 (1992) (quoting Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)); see also *Morrissette* v. *United States*, 342 U.S. 246, 263 (1952). As a result, "'[t]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.'" *Kelly* v. *Robinson*, 479 U.S. 36, 47 (1986) (quoting *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 501 (1986)). Put another way, a change in the existing legal framework is not to be presumed "without specific provision in the *text of the statute*." *United Sav. Ass'n*, 484 U.S. at 380 (emphasis added) (rejecting reliance on "legislative history" to sup-

port a "change in the existing rules"); cf. *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 68 U.S.L.W. 4441, 4444 2000) (rejecting presumption where "language" of statute "leaves no room for clarification by [pre-existing] practice").

Application of these principles confirms that the district court's order compelling the parties to arbitrate their dispute is not a "final decision" under Section 16(a)(3).

B. The Purpose Of The Federal Arbitration Act, The Structure Of Section 16, And The Legal Framework Against Which Section 16(a)(3) Was Enacted Confirm That An Order Compelling Arbitration In An "Embedded" Proceeding Is Not A "Final Decision" Under Section 16(a)(3).

Section 16(a) provides, in pertinent part, that: "An appeal may be taken from . . . (3) a final decision with respect to an arbitration that is subject to [the FAA]." 9 U.S.C. § 16(a)(3). Because Congress did not define "final decision," its meaning derives from its relevant context, see *Brown*, 513 U.S. at 118, which consists of (i) the FAA, whose goals Section 16 was designed to foster, (ii) the structure of Section 16 itself, and (iii) the pre-existing legal framework defining "final decision" in the context of arbitration orders.

First, interpretation of the term "final decision" in Section 16(a)(3) must take into account the "object and policy" of the FAA. *Dole*, 494 U.S. at 35; see also *United Sav. Ass'n*, 484 U.S. at 371. The FAA indisputably reflects a "liberal federal policy favoring arbitration agreements" that "calls for a summary and speedy disposition of motions . . . to enforce arbitration clauses." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24, 29 (1983). Further, the FAA is designed to permit "'parties to an arbitrable dispute [to move] out of court and into arbitration as quickly and easily as possible.'" *Southland Corp.* v. *Keating*, 465 U.S. 1, 7 (1984) (quoting *Moses H.*

Cone, 460 U.S. at 22). As a result, agreements to arbitrate are "not to be avoided by allowing one party to ignore the contract and resort to the courts" because "[s]uch a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Id.* Indeed, "[b]elated enforcement of [an] arbitration clause . . . significantly disappoints the expectations of the parties and frustrates the clear purpose of their agreement." *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 225 (1985) (White, J., concurring). Earlier this year, the Court reconfirmed these principles, explaining that the FAA reflects a "'statutory policy of rapid and unobstructed enforcement of arbitration agreements.'" *Cortez Byrd Chips, Inc.* v. *Bill Harbert Constr. Co.*, 120 S. Ct. 1331, 1337 (2000) (quoting *Moses H. Cone*, 460 U.S. at 23).

Second, and more specifically, the term "final decision" in Section 16(a)(3) also draws meaning from the pro-arbitration structure of Section 16. See *United Sav. Ass'n*, 484 U.S. at 371 (provision of statute "often" is clarified by "the remainder of the statutory scheme"). Under Section 16, an immediate appeal may be taken from orders, whether final or interlocutory, that are hostile to arbitration. 9 U.S.C. § 16(a)(1). Thus, a party can appeal immediately if a district court enters an order (i) "refusing a stay of any action" until arbitration has occurred, *id.* § 16(a)(1)(A), (ii) "denying a petition . . . to order arbitration to proceed," *id.* § 16(a)(1)(B), (iii) "denying confirmation of an award or partial award," *id.* § 16(a)(1)(D), (iv) "modifying, correcting or vacating an award," *id.* § 16(a)(1)(E), or (v) "granting, continuing, or modifying an injunction against an arbitration," *id.* § 16(a)(2).

In contrast, Section 16(b) denies an immediate appeal as of right from orders that are favorable to arbitration, including interlocutory orders (i) "granting a stay of any action" so that arbitration may proceed, *id.* § 16(b)(1), (ii) "directing arbitration to proceed under section 4," *id.* § 16(b)(2), or (iii) "refusing to enjoin an arbitration," *id.* § 16(b)(4). As to these orders, a disap-

pointed litigant either can await a "final decision" after the arbitration has taken place, *id.* § 16(a)(3), or may seek to convince the district court *and* the court of appeals that an appeal should be permitted immediately because the order satisfies the discretionary standards of section 1292(b) of title 28, *id.* § 16(b).[4] Thus, Section 16(b) precludes a district court from unilaterally deciding that an interlocutory order favoring arbitration may be appealed immediately. In sum, Section 16 reflects a pro-arbitration structure that provides for immediate appeals from orders hostile to arbitration and requires, absent grounds for mandamus or certification, that review of orders favoring arbitration await until after the arbitration has run its course.

Third, and most specifically, the term "final decision" in Section 16(a)(3) is a term of art with a well-developed legal meaning both generally and as applied to orders involving arbitration. See *Evans*, 504 U.S. at 259-60 & n.3; *Morrissette*, 342 U.S. at 263. The phrase "final decision" means an order "which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U.S. 229, 233 (1945); *accord Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994); *St. Louis, Iron Mountain & S. R.R.* v. *Southern Express Co.*, 108 U.S. 24, 28-29 (1883). Applying that understanding of a "final decision," this Court has held that orders granting or denying stays of judicial proceedings so that arbitration could go forward are not final decisions. See *Schoenamsgruber* v. *Hamburg Am. Line*, 294 U.S. 454, 456 (1935) (order that required "the parties to proceed to arbitration"

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[4] Section 1292(b) provides for an appeal from an interlocutory order when "a district judge . . . shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation" *and* "[t]he Court of Appeals . . . permit[s] an appeal to be taken from such order." 28 U.S.C. § 1292(b).

and "stayed trial of the action pending filing of the award" "definitely" was "not final"); see also *Shanferoke Coal & Supply Corp.* v. *Westchester Serv. Corp.*, 293 U.S. 449, 450-51 (1935) (order denying a motion to stay an "action, and all the proceedings therein . . . until an arbitration should be had in accordance with the terms of the contract sued on" "was not a final judgment"); *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 179 (1955) ("order denying stay could not be called a final decision under § 1291"). Further, the Court has rejected the "artificiality of resting appealability on an otherwise substanceless distinction between stays and dismissal." *Moses H. Cone*, 460 U.S. at 9 n.8.[5]

Similarly, the courts of appeals, building on this meaning of "final decision," developed a bright-line framework that distinguishes between "independent" and "embedded" proceedings for purposes of determining whether an arbitration order constitutes a "final decision." [6] For example, in *Farr & Co.* v. *CIA. Intercontinental De Navegacion de Cuba, S.A.*, 243 F.2d 342

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[5] *See also Sullivan* v. *Finkelstein*, 496 U.S. 617, 628 n.7 (1990) ("The label used by the District Court of course cannot control the order's appealability in this case, any more than it could when a district court labeled a nonappealable interlocutory order as a 'final judgment'"); *Liberty Mut. Ins. Co.* v. *Wetzel*, 424 U.S. 737, 741-42 (1976) (district court's "recital" that order was "final judgment" did not make interlocutory order immediately appealable).

[6] *See, e.g., Seacoast*, 143 F.3d at 628 (independent/embedded framework "based on finality principles that were firmly established at the time of section 16's enactment in 1988"); *Filanto*, 984 F.2d at 60 (in enacting Section 16, "Congress built upon the distinction the courts had previously recognized between so-called 'independent' proceedings and 'embedded' proceedings"); *Perera* v. *Siegal Trading Co.*, 951 F.2d 780, 784 (7th Cir. 1992) (prior to enactment of Section 16, "[m]any courts of appeals have concluded that arbitration orders in embedded proceedings constitute interlocutory and not final decisions"); *Stedor Enters., Ltd.* v. *Armtex, Inc.*, 947 F.2d 727, 729 (4th Cir. 1991) ("Before the adoption of section 16, whether an order granting or denying a motion to compel arbitration was appealable depended on whether . . . . the sole object of the suit was to determine arbitrability.").

(2d Cir. 1957), the Second Circuit held that an order compelling arbitration "in an independent proceeding" was a "final and appealable" order, whereas such an order "made in a pending suit" would be "viewed as being interlocutory." *Id.* at 345. Similarly, in *Hartford Fin. Sys., Inc.* v. *Florida Software Servs., Inc.*, 712 F.2d 724 (1st Cir. 1983) (Breyer, J.), the First Circuit relied upon the distinction between embedded and independent proceedings in assessing whether an arbitration order was "final." *Id.* at 728. While noting that some courts differed, the First Circuit held that an order compelling arbitration in an "embedded" proceeding was not "final" because such orders merely "preclude further consideration of the merits of the case until arbitration is concluded," when "the litigation in court will resume and the parties can appeal their legal questions after the court has issued a final decision." *Id.* at 729. In doing so, the *Hartford* court explained that a contrary holding "would have led to piecemeal appeals" and "would have run counter to the congressional policy of encouraging arbitration." *Id.* at 728.

In addition to providing a clear, easily-administered test, the embedded/independent framework developed by the courts of appeals prior to enactment of Section 16 was consistent with the general definition of "final decision" under this Court's precedents. Thus, in an "independent" proceeding – which seeks only an order compelling arbitration – an order compelling or denying arbitration is a "final decision" because it does, in fact, "end[] the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin*, 324 U.S. at 233. In contrast, in an "embedded" proceeding – which seeks relief on the merits apart from whether the parties must arbitrate the dispute – an order compelling or denying arbitration is not a "final decision" because such a decision does not end "the litigation on the merits" or "leave[] nothing for the court to do but execute the judgment." *Id.* Rather, after the arbitration has concluded, further judicial involvement will be "necessary for this award to become enforceable." *Perera*, 951 F.2d at 784; 9

U.S.C. § 9 (governing enforcement of arbitration awards); *id.* § 10 (governing vacatur of arbitration awards). Such an order is not a "final decision" because "it remains undeniable that . . . arbitration cannot produce an enforceable result without further judicial action." *Lummus Co.* v. *Commonwealth Oil Refining Co.*, 297 F.2d 80, 86 (2d Cir. 1961) (Friendly, J.). Indeed, this Court has acknowledged that fact, explaining that after a court has stayed an action so that arbitration may be had, further court involvement is necessary to "'to confirm the award or to set it aside for irregularity, fraud, *ultra vires* or other defect.'" *Cortez Byrd Chips, Inc.*, 120 S. Ct. at 1338 (quoting *Marine Transit Corp.* v. *Dreyfus*, 284 U.S. 263, 275-76 (1932)).

Applying these principles, the order compelling arbitration in the embedded proceeding in this case is not a "final decision" under Section 16(a)(3), and therefore cannot be appealed immediately as of right. *First*, because Congress did not define "final decision," it is presumed that Congress intended to adopt the firmly established meaning of that term. See *Evans*, 504 U.S. at 259-60 & n.3. Prior to enactment of Section 16, the law among the courts of appeals, though not unanimous, firmly established that an order requiring the parties to arbitrate their dispute that was entered in an "embedded" proceeding was not a "final decision." See, *e.g.*, *Farr & Co.*, 243 F.2d at 345; *Hartford*, 712 F.2d at 728-29. More generally, there can be no dispute that an order compelling arbitration in an embedded proceeding is not a "final decision" because it does not "end[] the litigation on the merits." *Catlin*, 324 U.S. at 233; see *Lummus*, 297 F.2d at 86 ("[A]rbitration cannot produce an enforceable result without further judicial action."). As a consequence, a party aggrieved by an order to arbitrate can, after the arbitration, challenge the arbitration award, and the court that ordered the parties to arbitrate would have the "'authority to confirm the award or to set it aside.'" *Cortez Byrd Chips*, 120 S. Ct. at 1338 (quoting *Marine Transit Corp.*, 284 U.S. at 276). A contrary conclusion would authorize multiple appeals and "piecemeal" appellate review,

rather than a single appeal *after* the arbitration proceeding has occurred and *after* the district court has addressed the enforceability of the award under the FAA.

Second, the conclusion that an order compelling arbitration in an embedded proceeding is not a "final decision" also is warranted because that interpretation "produces a substantive effect that is compatible with the rest of the [statute]." *United Sav. Ass'n*, 484 U.S. at 371. Subsections (a)(1), (a)(2) and (b) of Section 16 reflect an unabashed pro-arbitration bias. Under subsections (a)(1) and (a)(2), orders hostile to arbitration, whether final or interlocutory, are immediately appealable as of right. 9 U.S.C. § 16(a)(1), (2). Under subsection (b), interlocutory orders that favor arbitration may not be appealed immediately as a matter of right but instead must await completion of the arbitration proceeding before they are reviewed. *Id.* § 16(b). Given this pro-arbitration structure, Congress also would have intended to give Section 16(a)(3) a similar pro-arbitration meaning. In this regard, an overly broad definition of "final decision" under Section 16(a)(3) would unduly limit the scope of subsection (b) which prohibits immediate appeals of interlocutory orders that favor arbitration.

Finally, the conclusion that Congress intended that Section 16(a)(3) be given a pro-arbitration construction is confirmed by the broader federal policy underlying the FAA: to promote the "'rapid and unobstructed enforcement of arbitration agreements.'" *Cortez Byrd Chips*, 120 S. Ct. at 1137 (quoting *Moses H. Cone*, 460 U.S. at 23). Interpreting section 16(a)(3) to authorize immediate appeals as of right from orders compelling arbitration in embedded proceedings could, as was done in this case, "lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration sought, to eliminate." *Southland*, 465 U.S. at 7. Indeed, the FAA was designed to allow parties "'[to move] out of court and into arbitration as quickly as possible.'" *Id.* (quoting *Moses H. Cone*, 460 U.S. at 22). In light of this "emphatic" policy in favor of arbitration, *Mitsubishi*

Motors Corp. v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985), the phrase "final decision" should be construed to exclude orders compelling arbitration in embedded proceedings and thereby prevent litigants, such as respondent, from improperly delaying enforcement of agreed-to arbitration provisions.

The court of appeals' contrary conclusion is based upon two erroneous premises. First, the court of appeals relied on snippets from the legislative history of Section 16 to conclude that Congress intended to do away with the embedded/independent framework. Pet. App. 12a. That reliance violates the rule of construction that "if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific," *Kelly*, 479 U.S. at 47, with a "specific provision in the text of the statute," *United Savings Association*, 484 U.S. at 380. Section 16 illustrates that controlling principle in practice. By enacting Section 16, Congress intended to do away with the judicially-created *Enelow-Ettelson* doctrine which governed appeals from certain interlocutory orders under 28 U.S.C. § 1292(b). Congress did so specifically in the text of Section 16 by dictating that an interlocutory order "granting a stay of any action" could not be appealed immediately as of right. 9 U.S.C. § 16(b)(1).[7] In contrast, with respect to the embedded/independent framework that the lower courts had developed to implement the "final decision" requirement, Congress did not repudiate that judicially created concept, but instead expressly adopted the same "final decision" language upon which the embedded/independent framework was predicated. Because the statutory text of Section 16(a)(3) does not purport to alter this judicially created approach, snippets from the legislative history

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[7] *See Hartford*, 712 F.2d at 726 (Breyer, J.) (explaining that the *Enelow-Ettelson* doctrine provided an exception to the rule that an order under Section 3 of the FAA is not appealable as an "injunction" under 28 U.S.C. § 1292(a)(1) "if the suit stayed pending arbitration is legal in nature rather than equitable").

cannot provide the "specific intent" necessary to establish that Congress sought to uproot the existing judicial scheme. See *United Sav. Ass'n*, 484 U.S. at 380.

Similarly, the court of appeals improperly gave controlling weight to the district court's decision to label its order compelling arbitration a "dismissal" "with prejudice," rather than a "stay" of the proceedings. Pet. App. 14a. The district court's label, however, had no bearing on any substantive right of respondent. Indeed, the district court expressly declined to resolve "the merits of the underlying claims themselves" and instead addressed solely the question whether respondent "may be compelled to arbitrate her claims." Pet. App. 26a n.5. As a result, regardless of the label, respondent will be entitled to challenge, if necessary, the outcome of the arbitration in the district court and then appeal, if necessary, the district court's decision to the court of appeals. Simply put, the label "dismissal" "with prejudice" should have no bearing on appealability under Section 16 because that label has no bearing on respondent's substantive rights. See *Liberty Mut. Ins.*, 424 U.S. at 742 (district court's decision to label interlocutory order a "final judgment" cannot control appealability of order); see also *Sullivan*, 496 U.S. at 628 n.7 (district court's "label" cannot control "appealability"); cf. *United States* v. *Wallace & Tiernan Co.*, 336 U.S. 793, 794 n.1 (1949) (label attached to dismissal order does not affect appealability).

In fact, this Court already has rejected, in a similar context, "the artificiality of resting appealability on an otherwise substanceless distinction between stays and dismissals." *Moses H. Cone*, 460 U.S. at 9 n.8. Adoption of such an "artificial" and "substanceless" distinction is even more inappropriate here because Congress could not have intended that a district court could unilaterally transform what is in substance an interlocutory order into a "final decision" merely by labeling that order a "dismissal" rather than a "stay." Indeed, such an interpretation must be rejected because it would allow a district court unilater-

ally to circumvent the requirement that interlocutory orders set forth in Section 16(b) may be appealed only if the district court *and* court of appeals agree that the requirements of 28 U.S.C. § 1292(b)(2) have been satisfied. See *Bennett*, 520 U.S. at 173 (interpretation of statute must give effect "to every clause and word of a statute . . . rather than to emasculate an entire section").

Under the FAA, petitioners are entitled to enforce their right to arbitrate by moving this dispute out of the courts "'and into arbitration as quickly and easily as possible.'" *Southland*, 465 U.S. at 7. Any appeal of the district court's order compelling arbitration in this embedded proceeding therefore must await the completion of the arbitration that the FAA and Section 16 were designed to foster.

II. THE ARBITRATION AGREEMENT IS ENFORCEABLE UNDER THE FEDERAL ARBITRATION ACT.

Contrary to the decision of the court of appeals, the agreement to arbitrate is enforceable under the FAA because it does not undermine respondent's ability to vindicate her federal statutory rights. With respect to the court of appeals' concern regarding the costs associated with arbitration, the arbitration agreement is not "silent." It provides that the arbitrator shall have "all powers provided by the law," Pet. App. 57a, and the "law" governing TILA and ECOA claims mandates that a prevailing plaintiff is entitled to recover such costs as part of her damages. But, even if the arbitration agreement were "silent" or ambiguous on this point, under the FAA, such ambiguity must be construed in favor of arbitration. As to the class action issue raised in respondent's Brief in Opposition, the Court need not address it because it is outside the questions presented and because the court of appeals never addressed it. Nevertheless, as explained below, there is no inherent conflict between individ-

ual arbitration and respondent's vindication of her statutory rights.

A. The Federal Arbitration Act Reflects A Strong Presumption In Favor Of Arbitration Of Federal Statutory Claims.

The legal standards governing the enforceability of arbitration agreements under the FAA are well established. Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Court has held that this provision manifests a "'liberal federal policy favoring arbitration agreements.'" *Gilmer*, 500 U.S. at 25 (quoting *Moses H. Cone*, 460 U.S. at 24). As a result of that federal policy, judicial "suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants" plainly is "far out of step with [the Court's] current strong endorsement of the federal statutes favoring this method of resolving disputes." *Rodriguez de Quijas*, 500 U.S. at 481. Indeed, under the FAA, courts employ an "emphatic policy in favor of arbitral dispute resolution," *Mitsubishi*, 473 U.S. at 631, in which "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. at 24-25.

This duty to "'rigorously enforce agreements to arbitrate,'" *Shearson/Am. Express, Inc.* v. *McMahon*, 482 U.S. 220, 226 (1987) (quoting *Byrd*, 470 U.S. at 221), "is not diminished when a party bound by an agreement raises a claim founded on statutory rights," *id.*; *accord Mitsubishi*, 473 U.S. at 626. With respect to disputes implicating federal statutory law, this Court has adopted a two-part test to determine whether private parties may agree to resolve such claims through arbitration. *Id.* at 628.

First, because the "central purpose of the Federal Arbitration Act" is "to ensure 'that private agreements to arbitrate are enforced according to their terms,'" *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (quoting *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 479 (1989)), the court must determine whether the arbitration agreement encompasses the federal statutory claims, *Mitsubishi*, 473 U.S. at 626. In conducting that inquiry, "'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" *Id.* at 626 (quoting *Moses H. Cone*, 460 U.S. at 24-25).

Second, the court must determine whether the party's federal statutory "claims are nonarbitrable even though it has agreed to arbitrate them." *Id.* at 628. Put another way, "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Gilmer*, 500 U.S. at 26 (internal quotation marks omitted); see *McMahon*, 482 U.S. at 227. Congressional intent to preclude arbitration must be "discoverable in the text of the [federal statute], its legislative history, or an 'inherent conflict' between arbitration and the [federal statute's] underlying purposes." *Gilmer*, 500 U.S. at 26. In particular, "'[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.'" *Id.* (quoting *Mitsubishi*, 473 U.S. at 637). The party seeking to avoid arbitration bears the burden to show plainly that the agreement to arbitrate is contrary to congressional intent. *Id.*

Applying these standards, the Court has upheld agreements to arbitrate disputes arising under the Securities and Exchange Act of 1934, *McMahon*, 482 U.S. at 238; the Securities Act of 1933, *Rodriguez de Quijas*, 490 U.S. at 483; the Sherman Act, *Mitsubishi*, 473 U.S. at 629; the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *McMahon*, 482 U.S. at 242; the

Age Discrimination in Employment Act ("ADEA"), *Gilmer*, 500 U.S. at 35; and the Carriage of Goods by Sea Act ("COGSA"), *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 541 (1995).

B. Under The Federal Arbitration Act, The Arbitration Agreement Is Enforceable To Resolve Respondent's Claims Under The Truth In Lending Act And Equal Credit Opportunity Act.

Application of this two-part test confirms that Congress did not intend to preclude petitioners and respondent from agreeing to arbitrate their disputes under TILA and ECOA.

1. The broad language of the arbitration agreement plainly covers respondent's federal statutory claims. It provides:

> All disputes, claims, or controversies arising from or relating to this Contract or the relationships which result from this Contract . . . shall be resolved by binding arbitration . . . .

Pet. App. 57a. The arbitration agreement further states: "The parties agree and understand that all disputes arising under *case law, statutory law, and all other laws* . . . will be subject to binding arbitration." *Id.* (emphasis added). Plainly, respondent's claims under TILA and ECOA relate to the Contract and qualify as "disputes arising under . . . statutory law." *Id.*; cf. *Mitsubishi*, 473 U.S. at 625 (holding that parties agreed to arbitrate disputes under the Sherman Act and other federal statutes even though "the arbitration clause . . . d[id] not mention these statutes or statutes in general"); *AT&T Techs., Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 648 (1986). Indeed, in her Complaint, respondent has conceded that the arbitration agreement "seeks to compel the resolution of *all statutory causes of action in arbitration.*" J.A. 26 (Second Amended Compl. ¶ 27) (emphasis added). But, even if there were some doubt about the parties' intent to arbitrate respondent's claims –

and there is none – under the FAA, the parties' intentions "are generously construed as to issues of arbitrability." *Mitsubishi*, 473 U.S. at 626. In short, the broad language of the arbitration agreement encompasses respondent's statutory claims.

2. Respondent thus bears the burden of establishing that Congress, through a separate statute, "intended to preclude a waiver of judicial remedies for the statutory rights at issue," *McMahon*, 482 U.S. at 227. Respondent cannot satisfy that burden. There is nothing in the text or legislative history of TILA or ECOA to support the conclusion that Congress intended to preclude private parties from agreeing to arbitrate such claims. See *Mitsubishi*, 473 U.S. at 628. Furthermore, there is no "inherent conflict" between the arbitration agreement and respondent's vindication of her statutory rights under TILA or ECOA.

a. *Statutory Text.* The text of TILA and ECOA reflects that Congress did not consider federal procedures essential to vindicating substantive rights under these statutory schemes and therefore authorized private parties to trade the procedures of federal court for the "simplicity, informality, and expedition of arbitration." *Id.*

Both TILA and ECOA provide that the substantive federal rights protected by these statutory schemes may be enforced by individuals either "in any United States district court, or *in any other court of competent jurisdiction.*" 15 U.S.C. § 1640(e) (TILA) (emphasis added); *accord* 15 U.S.C. § 1691e(c), (f) (ECOA). In *Rodriguez de Quijas*, this Court explained that where Congress authorizes concurrent jurisdiction over federal claims in State courts – whose procedures differ from those in federal courts – Congress thereby expresses its view that federal procedures are not essential for vindication of the underlying statutory rights. 490 U.S. at 482. Specifically, the Court ruled that "the grant of concurrent jurisdiction constitutes *explicit authorization* for complainants to waive [federal procedural] protections by filing suit in state court." *Id.* (emphasis added).

Similarly, in *Gilmer*, the Court noted that "arbitration [was] consistent with Congress' grant of concurrent jurisdiction . . . to state and federal courts, because arbitration agreements, 'like the provision for concurrent jurisdiction, serve to advance the objective of allowing [claimants] a broader right to select the forum for resolving disputes, whether it be judicial or otherwise.'" 500 U.S. at 29 (quoting *Rodriguez de Quijas*, 490 U.S. at 483) (citation omitted).

Here, as in *Rodriguez de Quijas* and *Gilmer*, Congress' grant of concurrent jurisdiction in State and federal courts to address claims under TILA and ECOA "constitutes explicit authorization" to allow private parties to agree to arbitrate claims arising under these statutes. *Rodriguez de Quijas*, 490 U.S. at 482; see also *Gilmer*, 500 U.S. at 29. As this Court explained in *Mitsubishi*, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." 473 U.S. at 628.

b. *Legislative History.* The legislative histories of TILA and ECOA do not specifically address whether individuals are precluded from agreeing to arbitrate these statutory claims. Indeed, the district court in this case explained that respondent did "not cite any provision of the text or legislative history of either the TILA or the ECOA that expressly precludes waiver of judicial remedies." Pet. App. 30a. Similarly, in the court of appeals, respondent acknowledged that "[t]here is no indication that arbitration was ever considered by Congress." Appellant's Br. 31; see *Gilmer*, 500 U.S. at 26 (adopting party's concession that "nothing in the . . . legislative history explicitly precludes arbitration").

c. "*Inherent Conflict.*" There is no "inherent conflict" between the arbitration agreement in this case and respondent's

vindication of her substantive federal statutory rights under TILA or ECOA. In reaching the contrary conclusion, the court of appeals expressed its view that the arbitration agreement was "silent" on the issue of costs and fees and that this "silence" was inconsistent with TILA because it "fail[ed] to provide the minimum guarantees required to ensure that [respondent's] ability to vindicate her statutory rights will not be undone by steep filing fees, steep arbitrators' fees, or other high costs of arbitration." Pet. App. 18a. Specifically, the court of appeals stated that "[b]ecause the clause is silent on the subject of arbitration fees and costs, [respondent] might be required to bear substantial costs of the arbitration even if she were to prevail on her TILA claim." Pet. App. 19a. That conclusion does not withstand scrutiny.

First, the court of appeals was wrong in concluding that the arbitration agreement was "silent" as to whether respondent would "be required to bear substantial costs of the arbitration." Pet. App. 19a. The arbitration agreement provides that the "arbitrator shall have *all powers provided by the law*" and that those "powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief." Pet. App. 57a (emphasis added). As this Court explained in *Mitsubishi*, "[w]here the parties have agreed that the arbitral body is to decide a defined set of claims which includes . . . [a federal statutory claim]," the "inten[t] of the parties" also dictates that the arbitral body will be "bound to decide that dispute in accord with the . . . law giving rise to the claim." 473 U.S. at 636-37. Because the arbitration agreement plainly encompasses respondent's federal statutory claims under TILA and ECOA, as in *Mitsubishi*, the arbitrator would be "bound to decide th[e] dispute in accord with the . . . law giving rise to the claim." *Id.* at 636-37. Applied here, that legal principle refutes any concern that respondent's award might be "undone by steep filing fees, steep arbitrators' fees, or other high costs of arbitration" because the "law giving rise to" respondent's claims under

TILA and ECOA mandates that respondent, if she prevails, will be awarded "the costs of the action, together with a reasonable attorney's fee." 15 U.S.C. § 1640(a)(3) (TILA); see *id.* § 1691e(d) (ECOA) (same). In short, the arbitration agreement makes clear that respondent would be entitled to "the costs of the action, together with a reasonable attorney's fee" if she prevailed in arbitration on her TILA and ECOA claims.

Any possible doubt on this issue is resolved by this Court's decision in *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). There, the Court considered whether the terms of an arbitration agreement authorized the award of punitive damages. *Id.* at 54. The arbitration agreement in *Mastrobuono* provided that controversies would "'be settled by arbitration in accordance with the rules . . . of the National Association of Securities Dealers [NASD].'" *Id.* at 58 n.2. Recognizing that the NASD Rules referenced in the arbitration agreement did not provide "clear authorization of punitive damages," *id.* at 61, the Court nevertheless explained that "when a court interprets . . . an agreement covered by the FAA, 'due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration,'" *id.* at 62 (quoting *Volt*, 489 U.S. at 476). Applying that principle, the Court held that any "ambiguity" in the arbitration agreement must be resolved to allow recovery of punitive damages. *Id.* at 64.

To the extent that there is any ambiguity in the arbitration agreement as to whether the arbitrator has authority to award respondent "the costs of the action," 15 U.S.C. § 1640(a)(3), the Court's decision in *Mastrobuono* confirms that any such ambiguity must be resolved "'in favor of arbitration,'" 514 U.S. at 62 (quoting *Volt*, 489 U.S. at 476); *accord Moses H. Cone*, 460 U.S. at 24-25. Thus, the court of appeals simply was wrong that respondent "might be required to bear substantial costs of the arbitration even if she were to prevail on her TILA claim." Pet. App. 19a. The arbitration agreement expressly grants the arbi-

trator "all powers provided by the law" and the "law" upon which respondent's claims under TILA or ECOA are based makes clear that respondent, if she prevails, is entitled to an award including the "costs of the action, together with a reasonable attorney's fee." 15 U.S.C. § 1640(a)(3); *id.* § 1691e(d). In short, far from creating an "inherent conflict" with the statutory scheme, the arbitration agreement incorporates and reinforces TILA and ECOA as they relate to the award of the "costs of the action."

Second, the court of appeals ignored these controlling standards and instead expressed its distrust of arbitration by adopting a presumption *against* arbitration. Thus, the court of appeals manufactured "serious concerns with respect to filing fees, arbitrators' costs," Pet. App. 17a, by positing a series of imagined circumstances that found no support in the record, and then concluding that the arbitration agreement was unenforceable because it failed expressly to address each of the court's worst-case hypotheses. For example, the court of appeals speculated that the arbitration agreement created unbearable risks because it did not expressly address (i) whether "filing fees [we]re required," (ii) which party bore "initial responsibility for filing fees" and (iii) whether there was a process for "waiver in cases of financial hardship." Pet. App. 17a, 18a. Such an approach would call into question thousands of arbitration agreements that do not spell out the precise procedures that an arbitrator will apply if faced with any of the innumerable issues or combinations of questions regarding the costs associated with arbitration. Moreover, the distrust of arbitration reflected in such an approach would not be limited to costs but would extend to each and every aspect of arbitration. As a result, arbitration agreements would no doubt become unwieldy and more expensive as drafters sought to cover every possible contingency for fear that a reviewing court would strike down the agreement because it was "silent" or "ambiguous" on an issue of concern to that court. In addition to being bad policy, the court of appeals' ap-

proach to interpretation of arbitration agreements is solidly foreclosed by binding precedent requiring that "'questions of arbitrability must be addressed with a healthy regard for the federal policy *favoring* arbitration.'" *Mitsubishi*, 473 U.S. at 626 (quoting *Moses H. Cone*, 460 U.S. at 24) (emphasis added).[8]

Similarly, the court of appeals also erred by expressing concern that vindication of federal rights likely would be contingent on "who conducts the arbitration." Pet. App. 18a. That "concern" reflects nothing more than an improper mistrust of the arbitral process. The settled rule is that "there is no reason to assume at the outset that arbitrators will not follow the law." *McMahon*, 482 U.S. at 232; see also *Gilmer*, 500 U.S. at 30; *Mitsubishi*, 473 U.S. at 636. Thus, this Court has confirmed that courts may not "indulge the presumption that the . . . arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." *Mitsubishi*, 473 U.S. at 634; see also *Gilmer*, 500 U.S. at 30 (same). Such mistrust "rest[s] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would be complainants," a view that is "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Rodriguez de Quijas*, 490 U.S. at 481; see *McMahon*, 482 U.S. at 231-32 (rejecting "general

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[8] *See also Mastrobuono*, 514 U.S. at 62 ("'due regard must be given to the federal policy favoring arbitration'"); *Gilmer*, 500 U.S. at 25 (FAA "manifest[s] a 'liberal federal policy favoring arbitration agreements'"); *Volt Info. Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989) ("due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration"); *McMahon*, 482 U.S. at 226 (FAA "establishes a 'federal policy favoring arbitration'" and "requir[es] that 'we rigorously enforce agreements to arbitrate'"); *Southland*, 465 U.S. at 10 (through the FAA, "Congress declared a national policy favoring arbitration").

suspicion of the desirability of arbitration and the competence of arbitral tribunals").[9]

In addition, even if the court of appeals' distrust of the arbitral process could create a "risk" that the arbitrator might refuse to follow the substantive provisions of the federal statutory scheme – and it cannot – that possibility alone could not justify holding the arbitration agreement unenforceable. Indeed, this Court rejected a similar argument in *Vimar Sequros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528 (1995). There, the Court addressed a challenge to enforcement of a Japanese arbitration clause under the FAA based on speculation that "there [was] no guarantee foreign arbitrators w[ould] apply [the governing federal statutory scheme]." *Id.* at 539. The Court explained that such speculation was, at best, "premature" because "[a]t this interlocutory stage it is not established what law the arbitrators will apply to petitioner's claims or that petitioner will receive diminished protection as a result." *Id.* at 540. Similarly, in *Mitsubishi*, the Court declined to "speculate" whether the arbitral panel would apply the correct legal standards because that issue could be addressed when a court was asked "to enforce an award." 473 U.S. at 637 & n.19. Here, as in *Vimar* and *Mitsubishi*, speculation regarding the manner in which the arbitrator will apply the governing legal standards on the issue of costs and fees cannot justify striking down the arbitration agreement before the arbitrator has been given the opportunity to address those issues in the first instance.

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[9] *See also Gilmer*, 500 U.S. at 30 (rejecting "generalized attacks on arbitration" which "'res[t] on suspicion of arbitration'"); *McMahon*, 482 U.S. at 231-32 ("It is difficult to reconcile *Wilko*'s mistrust of the arbitral process with this Court's subsequent decisions" because "most of the reasons given in *Wilko* have been rejected subsequently by the Court . . . ."); *Mitsubishi*, 473 U.S. at 626-27 (explaining that Court was "well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution").

Moreover, even if the arbitrator ultimately were to rule in respondent's favor, but then deny her "the costs of the action," the arbitration agreement nevertheless should be enforced because, under the FAA, respondent still could effectively vindicate her federal statutory cause of action through post-arbitration review of the arbitral award. This Court repeatedly has ruled that judicial review of arbitration awards under the FAA is "sufficient to ensure that arbitrators comply with the requirements of the statute." *McMahon*, 482 U.S. at 232; see also *Gilmer*, 500 U.S. at 32 n.4; *Mitsubishi*, 473 U.S. at 636-37 & n.19. Specifically, the FAA provides post-arbitration relief so that an aggrieved party may modify or vacate an arbitral award where the arbitrator disregards the applicable law. See 9 U.S.C. §§ 10, 11. As the Court explained in both *Gilmer* and *McMahon*, "'although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.'" 500 U.S. at 32 n.4 (quoting *McMahon*, 482 U.S. at 232). Thus, if there were some basis for concern that an arbitrator might manifestly disregard the applicable law and refuse to award a prevailing plaintiff "the costs of the action, together with a reasonable attorney's fee," 15 U.S.C. § 1640(a)(3), post-arbitration review would remedy any such violation of the governing law.

Finally, to the extent that the court of appeals expressed "concerns" that the costs of arbitration would be "steep" or "high," that concern was unsupported and contrary to common sense. Pet App. 17a, 18a. The law is clear that the party seeking to avoid arbitration bears the burden of proof. *Gilmer*, 500 U.S. at 26. And, the record is clear that respondent failed to satisfy *her* burden on the issue of arbitration costs. Pet. App. 19a ("[W]e lack similar information about how claimants fare under Green Tree's arbitration clause."). Absent such record evidence, the court of appeals' assumption that such costs might be "steep" or "high" simply reflects a mistrust of the arbitral process that is impermissible under this Court's decisions. See, *e.g.*, *Gilmer*,

500 U.S. at 30. Moreover, the assumption underlying that mistrust – *i.e.*, that arbitration would be more costly than litigation – is directly contradicted by the findings of Congress and the experience of this Court. See, *e.g.*, Y2K Act, 15 U.S.C. § 6601(b)(3) (parties choose arbitration "to avoid costly and time-consuming litigation"); H.R. Rep. No. 97-542, at 13 (1982) *reprinted in* 1982 U.S.C.C.A.N. 765, 777 (arbitration "is usually cheaper and faster than litigation"); *Allied-Bruce*, 513 U.S. at 280 (arbitration "often would seem helpful to individuals . . . who need a less expensive alternative to litigation").[10]

C. Respondent's Alternative Argument That Congress Intended To Preclude Individual Agreements To Arbitrate Truth In Lending Act Claims Should Be Rejected.

In her Brief in Opposition, respondent also argued that the court of appeals' conclusion that "Green Tree's arbitration clause was unenforceable" could be sustained on the alternative ground that the arbitration agreement precluded respondent from bringing her TILA claim as a class action. Opp. 19.[11] The Court need not address this argument because it was not addressed by the court of appeals and is not within the questions

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[10] Even if respondent could demonstrate that the costs of an arbitration proceeding would be greater than the costs of litigation in court, that conclusion would not affect respondent's ability to vindicate her statutory rights because, if she prevailed, she would be entitled to recover "the costs of the action." 15 U.S.C. § 1640(a)(3); *id.* § 1691e(d). Moreover, as in *Vimar*, "[i]t would be unwieldy and unsupported by the terms or policy of the statute to require courts to proceed case by case to tally the costs and burdens to particular plaintiffs in light of their means, the size of their claims, and the relative burden on the [plaintiff]." 515 U.S. at 536.

[11] Respondent did not make a similar argument with respect to her claim under ECOA in her Brief in Opposition. *See* Opp. 19-21.

presented.[12] In any event, respondent's argument regarding the availability of class action procedures in arbitration previously has been rejected by this Court and finds no support in TILA.

The arbitration agreement is enforceable because respondent may effectively vindicate through individual arbitration her statutory rights under TILA. See *Gilmer*, 500 U.S. at 28. The crux of respondent's argument is that because Congress "contemplated" that some individual might choose to bring a TILA claim in the context of a class action, Congress thereby intended to prohibit individuals from agreeing to arbitrate TILA claims individually. Opp. 19-21. As this Court explained in *Gilmer*, 500 U.S. at 32, the fact that a federal statute contemplates that individuals might bring class actions does not support the conclusion that Congress intended to preclude individual arbitration. *Id.*

In *Gilmer*, the petitioner entered into an arbitration agreement with his employer, *id.* at 23, but contended that it was unenforceable as applied to his age discrimination claim because arbitration created an "inherent conflict" with the purposes of the ADEA, *id.* at 32. Specifically, Gilmer argued that an "inherent conflict" resulted because the ADEA expressly authorized class actions, whereas class action procedures were unavailable in arbitration. *Id.*; see 29 U.S.C. § 216(b) (authorizing class actions for ADEA claims). This Court rejected that argument, holding that "'even if the arbitration could not go forward as a

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[12] Under similar circumstances, the Court has declined to address issues outside the questions presented, and may do so here. *See Roberts* v. *Galen, Inc.*, 525 U.S. 249, 253-54 (1999) (declining to address "two alternative grounds for affirmance" that were outside the questions presented and were "[in]sufficiently developed below . . . to assess them"); *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999) (declining to "decide in the first instance issues not decided below"); *see also Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987) (declining to address argument regarding unenforceability of arbitration agreement where issue was not addressed below).

class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.'" 500 U.S. at 32 (alteration in original) (quoting *Nicholson* v. *CPC Int'l Inc.*, 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J., dissenting)).

That holding is equally applicable here. TILA, unlike ADEA, does not create any statutory right to bring a class action. Rather TILA anticipates that some individuals may seek to bring their TILA claims as class actions and places a limitation on the total recovery that would otherwise be available "in any class action or series of class actions arising out of the same failure to comply by the same creditor." 15 U.S.C. § 1640(a)(2)(B). Specifically, Section 1640 caps such statutory damages at the "lesser of $500,000 or 1 per centum of the net worth of the creditor." *Id.*; see also *Amicus* Brief of the Chamber of Commerce of the United States of America at 7-8 (explaining that district court must consider host of factors when determining proper level of class relief). Thus, TILA merely recognizes that some plaintiffs may choose to proceed individually, while others may choose to proceed through a class action. Compare 15 U.S.C. § 1640(a)(2)(A) (setting limits on statutory damages in "an individual action") with *id.* § 1640(a)(2)(B) (setting limits on recovery "in any class action or series of class actions arising out of the same failure to comply"). As in *Gilmer*, the fact that Congress contemplated "the possibility" that individuals might choose to bring class actions under TILA does not mean that "'that individual attempts at conciliation were intended to be barred.'" 500 U.S. at 32.

More generally, "[b]y agreeing to arbitrate . . . a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi*, 473 U.S. at 628; see also *Rodriguez de Quijas*, 490 U.S. at 481. Applying that standard, this Court has held in a wide variety of circumstances that an agreement to

waive the procedural rules available in federal court does not prevent a party from "'effectively . . . vindicat[ing] [his or her] statutory cause of action in the arbitral forum.'" *Gilmer*, 500 U.S. at 28 (second alteration in original) (quoting *Mitsubishi*, 473 U.S. at 637).

For example, in *McMahon*, the Court enforced an arbitration provision that waived the provision for "exclusive jurisdiction" in the district courts of the United States for a violation of the Exchange Act of 1934. 482 U.S. at 227-28. In doing so, the Court rejected the McMahons' argument that arbitration would "'weaken their ability to recover under the [Exchange] Act,'" *id.* at 231, holding instead that "the streamlined procedures of arbitration d[id] not entail any consequential restriction on substantive rights." *Id.* at 232. Similarly, in *Rodriguez de Quijas*, the Court held that the notion that arbitration procedures "weaken[ed] the protections afforded in the substantive law to would-be complainants" was "far out of step with [the Court's] current strong endorsement of the federal statutes favoring this method of resolving disputes." 490 U.S. at 481. Finally, in *Gilmer*, the Court relied upon the same "'strong endorsement of the federal statutes favoring'" arbitration to reject a "host of challenges to the adequacy of arbitration procedures." 500 U.S. at 30.

These principles apply equally to respondent's claim under TILA. Here, there can be no dispute that the class action mechanism is procedural. See Fed. R. Civ. P. 23; see also *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 332 (1980) ("the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of the substantive claims"); *Gilmer*, 500 U.S. at 33 (characterizing argument regarding absence of class action mechanism in arbitral forum a "claimed procedural inadequac[y]"). That fact is dispositive because Congress made clear that application of federal procedures was not essential to an individual's vindication of statutory rights under TILA. Specifically, TILA provides that an individual may bring a civil ac-

tion in "any United States district court" or "any other court of competent jurisdiction." 15 U.S.C. § 1640(e). As discussed previously, "the grant of concurrent jurisdiction constitutes explicit authorization for complainants to waive [federal procedural] protections by filing suit in state court." *Rodriguez de Quijas*, 490 U.S. at 482; see also *Gilmer*, 500 U.S. at 29. Accordingly, by granting concurrent jurisdiction in state and federal courts, Congress provided "explicit authorization" for individuals to waive federal procedural rights, including class action procedures, that are available in federal courts, but not in some state courts. See, *e.g.*, *Marx* v. *Broom*, 632 So. 2d 1315, 1322 (Miss. 1994) ("In enacting the Rules of Civil Procedure this Court intentionally omitted Rule 23, which would have covered class actions.").

Moreover, respondent is wrong in suggesting that class action procedures are somehow essential for respondent to vindicate her statutory rights under TILA. Opp. 21. In particular, respondent has argued that individual arbitration of such claims would not be "'economically feasible,'" *id.* (quoting *Roper*, 445 U.S. at 339), in light of the "imposition of potentially prohibitive [arbitration] costs," and the "the limited financial recoveries likely to be obtained," *id.* That argument ignores that Congress carefully designed a structure of incentives to ensure that plaintiffs could and would bring individual suits under TILA.

Under TILA, a complainant such as respondent who brings an individual action is entitled to recover (i) "any actual damage sustained," 15 U.S.C. § 1640(a)(1), *plus*, (ii) statutory damages of "twice the amount of any finance charge" or "not less than $200 or greater than $2,000," *id.* § 1640(a)(2)(A), *plus*, (iii) "the costs of the action, together with a reasonable attorney's fee," *id.* § 1640(a)(3). Given these incentives, it is no surprise that this Court has addressed numerous cases involving parties who brought individual lawsuits to vindicate their rights under

TILA.[13] Indeed, respondent relied upon an individual action brought under TILA to argue that "'the award of attorney's fees'" is the component of TILA necessary "'to effectuate this scheme.'" Opp. 18 (quoting *James* v. *Home Constr. Co.*, 689 F.2d 1357, 1359 (11th Cir. 1982)).[14]

Respondent was fully aware of the incentives provided by TILA for bringing an individual action and incorporated each of them into her request for "actual damages," "statutory damages," "attorney's fees and litigation expenses pursuant to 15 U.S.C. § 1640" and "costs of suit." J.A. 26 (Second Amended Compl. ¶ 24). Respondent's argument that, absent a class action mechanism, she could not effectively vindicate her statutory rights because individual arbitration would not be "economically feasible,'" Opp. 21, is particularly weak under the facts of her case. In addition to her claim under TILA, respondent also sought "actual damages," "attorney's fees and litigation expenses," "costs of suit," and "punitive damages" of up to $10,000, in connection with her allegations under ECOA. J.A. 27 (Second Amended Compl. ¶ 28); see also 15 U.S.C.

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[13] *See, e.g., Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 57 (1982); *American Express Co.* v. *Koerner*, 452 U.S. 233, 238-39 (1981); *Anderson Bros. Ford* v. *Valencia*, 452 U.S. 205, 208-09 (1981); *Ford Motor Credit Co.* v. *Cenance*, 452 U.S. 155, 156 (1981); *Kirchberg* v. *Feenstra*, 450 U.S. 455, 457-58 (1981); *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 558 (1980); *Mourning* v. *Family Publications Serv., Inc.*, 411 U.S. 356, 358-59 (1973).

[14] For the reasons discussed in Part II.B, *supra*, the arbitrator also would be authorized to award as damages "a reasonable attorney's fee," 15 U.S.C. § 1640(a)(3). As a result, respondent's reliance on *Roper*, 445 U.S. at 339, is misplaced because there, the Court characterized, in dictum, causes of action as "not economically feasible" when the total damages recovered would be less than the "costs of litigation, particularly attorney's fees." *Id.* at 338 n.9. In contrast, TILA makes clear that a prevailing party is entitled to actual damages, statutory damages and "the costs of the action, together with a reasonable attorney's fee." 15 U.S.C § 1640(a)(1)-(3).

§ 1691e(a), (b), (d). Given the total relief potentially available to respondent if she were to prevail in arbitration, there can be no dispute that respondent's lawsuit is "economically feasible" or that she "'effectively may vindicate [her] statutory cause of action in the arbitral forum.'" *Gilmer*, 500 U.S. at 28 (quoting *Mitsubishi*, 473 U.S. at 637).[15]

Finally, TILA does not reflect any congressional intent to permit and promote class actions at all costs, but instead provides limits on the recovery available under that statute that otherwise would not apply to general class actions brought under other statutes. 15 U.S.C § 1640(a)(2)(B).[16] Indeed, in May 1995, Congress enacted a "[c]lass action moratorium" which provided that, with respect to certain TILA claims, "no court may enter any order certifying any class action." See *id.* § 1640(i). In so doing, members of Congress identified what they viewed to be the "abuse of the Truth in Lending Act through class-action suits." 141 Cong. Rec. S5614 (daily ed. Apr. 24, 1995) (statement of sponsor Sen. Mack); see also 141 Cong. Rec. H4120-21 (daily ed. Apr. 4, 1995) (statement of

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[15] Apart from the incentives TILA provides to private parties to ensure compliance with its requirements, TILA also authorizes federal agencies and the Attorney General to seek administrative and criminal sanctions for violations of TILA. 15 U.S.C. §§ 1607, 1611; *see also Amicus* Brief of the Chamber of Commerce of the United States of America 18-29 (detailing administrative enforcement mechanisms of TILA).

[16] The legislative history of the 1974 and 1976 amendments to TILA similarly confirms that Congress intended that the substantive provisions of TILA could be vindicated through individual or class actions. Congress intended that its amendments would protect creditors from potentially "enormous penalties" that would be excessive to achieving voluntary compliance with TILA. S. Rep. No. 93-278, at 14-15 (1973). Moreover, the legislative history makes clear that the Congress envisioned that "consumers" would continue to choose to "bring individual or class actions against creditors" and that amendments were not meant to "preven[t] a series of individual civil actions." *Id.* at 15, 16.

Rep. Roukema). Congress' amendments to TILA cannot be reconciled with respondent's suggestion that class action litigation is the only mechanism through which she may "effectively vindicate [her] statutory rights."

* * *

The Court's prior pronouncements on the issue of arbitrability are equally applicable here: "[T]he streamlined procedures of arbitration do not entail any consequential restriction on substantive rights." *McMahon*, 482 U.S. at 232; see *Gilmer*, 500 U.S. at 26; *Rodriguez de Quijas*, 490 U.S. at 481; *Mitsubishi*, 473 U.S. at 628. "Having made the bargain to arbitrate," respondent "should be held to it." *Id.*

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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ADDENDUM

RELEVANT FEDERAL STATUTES

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9 U.S.C. § 2

Validity, irrevocability and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(July 30, 1947, c. 392, 61 Stat. 670.)

9 U.S.C. § 3

Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

(July 30, 1947, c. 392, 61 Stat. 670.)

9 U.S.C. § 4

Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that

purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

(July 30, 1947, c. 392, 61 Stat. 671; Sept. 3, 1954, c. 1263, § 19, 68 Stat. 1233.)

9 U.S.C. § 9

Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

(July 30, 1947, c. 392, 61 Stat. 672.)

9 U.S.C. § 10

Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

(July 30, 1947, c. 392, 61 Stat. 672; Nov. 15, 1990, Pub. L. 101-552, § 5, 104 Stat. 2745; Aug. 26, 1992, Pub. L. 102-354, § 5(b)(4), 106 Stat. 946.)

9.U.S.C. § 11

Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

(July 30, 1947, c. 392, 61 Stat. 673.)

9 U.S.C. § 16

Appeals

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

(Added Pub. L. 100-702, Title X, § 1019(a), Nov. 19, 1988, 102 Stat. 4671, § 15; renumbered Pub. L. 101-650, Title III, § 325(a)(1), Dec. 1, 1990, Stat. 5120.)

15 U.S.C. § 1601

Congressional findings and declaration of purpose

(a) Informed use of credit

The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of

consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

(b) Terms of personal property leases

The Congress also finds that there has been a recent trend toward leasing automobiles and other durable goods for consumer use as an alternative to installment credit sales and that these leases have been offered without adequate cost disclosures. It is the purpose of this subchapter to assure a meaningful disclosure of the terms of leases of personal property for personal, family, or household purposes so as to enable the lessee to compare more readily the various lease terms available to him, limit balloon payments in consumer leasing, enable comparison of lease terms with credit terms where appropriate, and to assure meaningful and accurate disclosures of lease terms in advertisements.

(Pub. L. 90-321, Title I, § 102, May 29, 1968, 82 Stat. 146; Pub. L. 93-495, Title III, § 302, Oct. 28, 1974, 88 Stat. 1511; Pub. L. 94-240, § 2, Mar. 23, 1976, 90 Stat. 257.)

15 U.S.C. § 1640

Civil liability

(a) Individual or class action for damages; amount of award; factors determining amount of award

Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title, or part D or E of this subchapter with respect to any

person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of the failure;

(2)(A) (i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000; or

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor;

(3) in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 1635 of this title, the costs of the action, together with a reasonable attorney's fee as determined by the court; and

(4) in the case of a failure to comply with any requirement under section 1639 of this title, an amount equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material.

In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional. In connection with the disclosures referred to in subsections (a) and (b) of section 1637 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title, section 1637(a) of this title, or of paragraph (4), (5), (6), (7), (8), (9), or (10) of section 1637(b) of this title or for failing to comply with disclosure requirements under State law for any term or item which the Board has determined to be substantially the same in meaning under section 1610(a)(2) of this title as any of the terms or items referred to in section 1637(a) of this title or any of those paragraphs of section 1637(b) of this title. In connection with the disclosures referred to in subsection (c) or (d) of section 1637 of this title, a card issuer shall have a liability under this section only to a cardholder who pays a fee described in section 1637(c)(1)(A)(ii)(I) or section 1637(c)(4)(A)(i) of this title or who uses the credit card or charge card. In connection with the disclosures referred to in section 1638 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title or of paragraph (2) (insofar as it requires a disclosure of the "amount financed"), (3), (4), (5), (6), or (9) of section 1638(a) of this title, or for failing to comply with disclosure requirements under State law for any term which the Board has determined to be substantially the same in meaning under section 1610(a)(2) of this title as any of the terms referred to in any of those paragraphs of section 1638(a) of this title. With respect to any failure to make disclosures required under this part or part D or E of this subchapter, liability shall be imposed only upon the creditor required to

make disclosure, except as provided in section 1641 of this title.

(b) Correction of errors

A creditor or assignee has no liability under this section or section 1607 of this title or section 1611 of this title for any failure to comply with any requirement imposed under this part or part E of this subchapter, if within sixty days after discovering an error, whether pursuant to a final written examination report or notice issued under section 1607(e)(1) of this title or through the creditor's or assignee's own procedures, and prior to the institution of an action under this section or the receipt of written notice of the error from the obligor, the creditor or assignee notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to assure that the person will not be required to pay an amount in excess of the charge actually disclosed, or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower.

(c) Unintentional violations; bona fide errors

A creditor or assignee may not be held liable in any action brought under this section or section 1635 of this title for a violation of this subchapter if the creditor or assignee shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programing, and printing errors, except that an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error.

(d) Liability in transaction or lease involving multiple obligors

When there are multiple obligors in a consumer credit transaction or consumer lease, there shall be no more than one recovery of damages under subsection (a)(2) of this section for a violation of this subchapter.

(e) Jurisdiction of courts; limitations on actions; State attorney general enforcement

Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation. This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law. An action to enforce a violation of section 1639 of this title may also be brought by the appropriate State attorney general in any appropriate United States district court, or any other court of competent jurisdiction, not later than 3 years after the date on which the violation occurs. The State attorney general shall provide prior written notice of any such civil action to the Federal agency responsible for enforcement under section 1607 of this title and shall provide the agency with a copy of the complaint. If prior notice is not feasible, the State attorney general shall provide notice to such agency immediately upon instituting the action. The Federal agency may—

(1) intervene in the action;

(2) upon intervening-

(A) remove the action to the appropriate United States district court, if it was not originally brought there; and

(B) be heard on all matters arising in the action; and

(3) file a petition for appeal.

(f) Good faith compliance with rule, regulation, or interpretation of Board or with interpretation or approval of duly authorized official or employee of Federal Reserve System

No provision of this section, section 1607(b) of this title, section 1607(c) of this title, section 1607(e) of this title, or section 1611 of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(g) Recovery for multiple failures to disclose

The multiple failure to disclose to any person any information required under this part or part D or E of this subchapter to be disclosed in connection with a single account under an open end consumer credit plan, other single consumer credit sale, consumer loan, consumer lease, or other extension of consumer credit, shall entitle the person to a single recovery under this section but continued failure to disclose after a recovery has been granted shall give rise to rights to additional recoveries. This subsection does not bar any remedy permitted by section 1635 of this title.

(h) Offset from amount owed to creditor or assignee; rights of defaulting consumer

A person may not take any action to offset any amount for which a creditor or assignee is potentially liable to such person under subsection (a)(2) of this section against any amount owed by such person, unless the amount of the creditor's or assignee's liability under this subchapter has been determined by judgment of a court of competent jurisdiction in an action of which such person was a party. This subsection does not bar a consumer then in default on the obligation from asserting a violation of this subchapter as an original action, or as a defense or counterclaim to an action to collect amounts owed by the consumer brought by a person liable under this subchapter.

(i) Class action moratorium

(1) In general

During the period beginning on May 18, 1995, and ending on October 1, 1995, no court may enter any order certifying any class in any action under this subchapter—

(A) which is brought in connection with any credit transaction not under an open end credit plan which is secured by a first lien on real property or a dwelling and constitutes a refinancing or consolidation of an existing extension of credit; and

(B) which is based on the alleged failure of a creditor—

(i) to include a charge actually incurred (in connection with the transaction) in the finance charge disclosed pursuant to section 1638 of this title;

(ii) to properly make any other disclosure required under section 1638 of this title as a result of the failure described in clause (i); or

(iii) to provide proper notice of rescission rights under section 1635(a) of this title due to the selection by the creditor of the incorrect form from among the model forms prescribed by the Board or from among forms based on such model forms.

(2) Exceptions for certain alleged violations

Paragraph (1) shall not apply with respect to any action—

(A) described in clause (i) or (ii) of paragraph (1)(B), if the amount disclosed as the finance charge results in an annual percentage rate that exceeds the tolerance provided in section 1606(c) of this title; or

(B) described in paragraph (1)(B)(iii), if—

(i) no notice relating to rescission rights under section 1635(a) of this title was provided in any form; or

(ii) proper notice was not provided for any reason other than the reason described in such paragraph.

(Pub. L. 90-321, Title I, § 130, May 29, 1968, 82 Stat. 157; Pub. L. 93-495, Title IV, §§ 406, 407, 408(a) to (d), Oct 28, 1974, 88 Stat. 1518; Pub. L. 94-222, § 3(b), Feb. 27, 1976, 90 Stat. 197; Pub. L. 94-240, § 4, Mar. 23, 1976, 90 Stat. 260; Pub. L. 96-221, Title VI, § 615, Mar. 31, 1980, 94 Stat. 180; Pub. L. 100-583, § 3, Nov. 3, 1988, 102 Stat. 2966; Pub. L. 103-325, Title I, § 153(a), (b), Sept. 23, 1994, 108 Stat. 2195; Pub. L. 104-12, § 2, May 18, 1995, 109 Stat. 161; Pub. L. 104-29, § 6, Sept. 30, 1995, 109 Stat. 274.)

15 U.S.C. § 1691

Scope of prohibition

(a) Activities constituting discrimination

It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—

(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);

(2) because all or part of the applicant's income derives from any public assistance program; or

(3) because the applicant has in good faith exercised any right under this chapter.

(b) Activities not constituting discrimination

It shall not constitute discrimination for purposes of this subchapter for a creditor—

(1) to make an inquiry of marital status if such inquiry is for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit and not to discriminate in a determination of credit-worthiness;

(2) to make an inquiry of the applicant's age or of whether the applicant's income derives from any public assistance program if such inquiry is for the purpose of determining the amount and probable continuance of income levels, credit history, or other pertinent element of credit-worthiness as provided in regulations of the Board;

(3) to use any empirically derived credit system which considers age if such system is demonstrably and statistically sound in accordance with regulations of the

Board, except that in the operation of such system the age of an elderly applicant may not be assigned a negative factor or value; or

(4) to make an inquiry or to consider the age of an elderly applicant when the age of such applicant is to be used by the creditor in the extension of credit in favor of such applicant.

(c) Additional activities not constituting discrimination

It is not a violation of this section for a creditor to refuse to extend credit offered pursuant to—

(1) any credit assistance program expressly authorized by law for an economically disadvantaged class of persons;

(2) any credit assistance program administered by a nonprofit organization for its members or an economically disadvantaged class of persons; or

(3) any special purpose credit program offered by a profit-making organization to meet special social needs which meets standards prescribed in regulations by the Board;

if such refusal is required by or made pursuant to such program.

(d) Reason for adverse action; procedure applicable; "adverse action" defined

(1) Within thirty days (or such longer reasonable time as specified in regulations of the Board for any class of credit transaction) after receipt of a completed application for credit, a creditor shall notify the applicant of its action on the application.

(2) Each applicant against whom adverse action is taken shall be entitled to a statement of reasons for such

action from the creditor. A creditor satisfies this obligation by—

(A) providing statements of reasons in writing as a matter of course to applicants against whom adverse action is taken; or

(B) giving written notification of adverse action which discloses (i) the applicant's right to a statement of reasons within thirty days after receipt by the creditor of a request made within sixty days after such notification, and (ii) the identity of the person or office from which such statement may be obtained. Such statement may be given orally if the written notification advises the applicant of his right to have the statement of reasons confirmed in writing on written request.

(3) A statement of reasons meets the requirements of this section only if it contains the specific reasons for the adverse action taken.

(4) Where a creditor has been requested by a third party to make a specific extension of credit directly or indirectly to an applicant, the notification and statement of reasons required by this subsection may be made directly by such creditor, or indirectly through the third party, provided in either case that the identity of the creditor is disclosed.

(5) The requirements of paragraph (2), (3), or (4) may be satisfied by verbal statements or notifications in the case of any creditor who did not act on more than one hundred and fifty applications during the calendar year preceding the calendar year in which the adverse action is taken, as determined under regulations of the Board.

(6) For purposes of this subsection, the term "adverse action" means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant

credit in substantially the amount or on substantially the terms requested. Such term does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.

(e) Appraisals; copies of reports to applicants; costs

Each creditor shall promptly furnish an applicant, upon written request by the applicant made within a reasonable period of time of the application, a copy of the appraisal report used in connection with the applicant's application for a loan that is or would have been secured by a lien on residential real property. The creditor may require the applicant to reimburse the creditor for the cost of the appraisal.

(Pub. L. 90-321, Title VII, § 701, as added Pub. L. 93-495, Title V, § 503, Oct. 28, 1974, 88 Stat. 1521, and amended Pub. L. 94-239, § 2, Mar. 23, 1976, 90 Stat. 251; Pub. L. 102-242, Title II, § 223(d), Dec. 19, 1991, 105 Stat. 2306.)

15 U.S.C. § 1691e

Civil liability

(a) Individual or class action for actual damages

Any creditor who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class.

(b) Recovery of punitive damages in individual and class actions for actual damages; exemptions; maximum amount of punitive damages in individual actions; limitation on total recovery in class actions; factors determining amount of award

Any creditor, other than a government or governmental subdivision or agency, who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for punitive damages in an amount not greater than $10,000, in addition to any actual damages provided in subsection (a) of this section, except that in the case of a class action the total recovery under this subsection shall not exceed the lesser of $500,000 or 1 per centum of the net worth of the creditor. In determining the amount of such damages in any action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.

(c) Action for equitable and declaratory relief

Upon application by an aggrieved applicant, the appropriate United States district court or any other court of competent jurisdiction may grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under this subchapter.

(d) Recovery of costs and attorney fees

In the case of any successful action under subsection (a), (b), or (c) of this section, the costs of the action, together with a reasonable attorney's fee as determined by the court, shall be added to any damages awarded by the court under such subsection.

(e) Good faith compliance with rule, regulation, or interpretation of Board or interpretation or approval by an official or employee of Federal Reserve System duly authorized by Board

No provision of this subchapter imposing liability shall apply to any act done or omitted in good faith in conformity

with any official rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(f) Jurisdiction of courts; time for maintenance of action; exceptions

Any action under this section may be brought in the appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction. No such action shall be brought later than two years from the date of the occurrence of the violation, except that—

(1) whenever any agency having responsibility for administrative enforcement under section 1691c of this title commences an enforcement proceeding within two years from the date of the occurrence of the violation,

(2) whenever the Attorney General commences a civil action under this section within two years from the date of the occurrence of the violation,

then any applicant who has been a victim of the discrimination which is the subject of such proceeding or civil action may bring an action under this section not later than one year after the commencement of that proceeding or action.

(g) Request by responsible enforcement agency to Attorney General for civil action

The agencies having responsibility for administrative enforcement under section 1691c of this title, if unable to obtain

compliance with section 1691 of this title, are authorized to refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted. Each agency referred to in paragraphs (1), (2), and (3) of section 1691c(a) of this title shall refer the matter to the Attorney General whenever the agency has reason to believe that 1 or more creditors has engaged in a pattern or practice of discouraging or denying applications for credit in violation of section 1691(a) of this title. Each such agency may refer the matter to the Attorney General whenever the agency has reason to believe that 1 or more creditors has violated section 1691(a) of this title.

(h) Authority for Attorney General to bring civil action; jurisdiction

When a matter is referred to the Attorney General pursuant to subsection (g) of this section, or whenever he has reason to believe that one or more creditors are engaged in a pattern or practice in violation of this subchapter, the Attorney General may bring a civil action in any appropriate United States district court for such relief as may be appropriate, including actual and punitive damages and injunctive relief.

(i) Recovery under both subchapter and fair housing enforcement provisions prohibited for violation based on same transaction

No person aggrieved by a violation of this subchapter and by a violation of section 3605 of Title 42 shall recover under this subchapter and section 3612 of Title 42, if such violation is based on the same transaction.

(j) Discovery of creditor's granting standards

Nothing in this subchapter shall be construed to prohibit the discovery of a creditor's credit granting standards under appropriate discovery procedures in the court or agency in which an action or proceeding is brought.

(k) Notice to HUD of violations

Whenever an agency referred to in paragraph (1), (2), or (3) of section 1691c(a) of this title—

> (1) has reason to believe, as a result of receiving a consumer complaint, conducting a consumer compliance examination, or otherwise, that a violation of this subchapter has occurred;
>
> (2) has reason to believe that the alleged violation would be a violation of the Fair Housing Act; and
>
> (3) does not refer the matter to the Attorney General pursuant to subsection (g) of this section,

the agency shall notify the Secretary of Housing and Urban Development of the violation, and shall notify the applicant that the Secretary of Housing and Urban Development has been notified of the alleged violation and that remedies for the violation may be available under the Fair Housing Act.

(Pub. L. 90-321, Title VII, § 706, as added Pub. L. 93-495, Title V, § 503, Oct. 28, 1974, 88 Stat. 1524, and amended Pub. L. 94-239, § 6, Mar. 23, 1976, 90 Stat. 253; Pub. L. 102-242, Title II, § 223(a) to (c), Dec. 19, 1991, 105 Stat. 2306.)